IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.1078 OF 2002

M/s.Hasmukhlal & Co. ...Petitioner.

Versus

Municipal Corporation for Greater Mumbai & Anr. ...Respondents.

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Mr. P.K. Samdani with Mr. V.K. Merchant i/b. Kishore Thakordas for the Petitioner.

Mrs. A.R. Joshi for the Respondents.

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CORAM : DR. D.Y. CHANDRACHUD, J.

March 23, 2005.

ORAL JUDGMENT:

The Chief Engineer (Roads and Development) of the Municipal Corporation floated tenders in June 2000 for the supply of road metal to the City Western Suburbs and Eastern Suburbs for a period of 12 months upto 9th September 2001. The Petitioner submitted a tender for the supply of crushed metal and machine

crushed metal required for building roads for Wards A to E and for the supply of crushed metal with dust for Wards F and G of the Municipal Corporation. The tender quotation was submitted by the Petitioner in the month of June 2000. On 15th September 2000, the Petitioner addressed a letter to the Deputy Chief Engineer (Roads) recording that the quarry owner had declined to supply two items viz., Item No.4 being 25 mm crushed metal and ItemNo.5 being 12.5 mm crushed metal and that, therefore, it was not possible for the Petitioner to stand by the offer in respect of those two items which were quoted for F and G Wards. On 19th September 2000, the Municipal Corporation issued a communication of the Deputy Chief Engineer stating that the Additional Municipal Commissioner had granted his sanction on 7th September 2000 for the supply of items for Wards A to E. Another communication was issued on 19th September 2000 in respect of the supply of items for F and G Wards at the total cost not exceeding Rs.20 lakhs. The Petitioner responded on 21st September 2000 recording that on 12th September 2000, the Corporation had already been informed that the Petitioner would not be in a position to effect

supplies of two items viz., Item Nos.4 and 5 and that accordingly, the offer had been withdrawn before the approval of the Standing Committee. The approval of the Standing Committee, it may be noted, was required under Section 69(c) of the Mumbai Municipal Corporation Act, 1888 in respect of supplies of a value in excess of Rs.15 lakhs. There followed another representation by the Petitioner on 25th September 2000. On 6th October 2000, the Petitioner submitted a representation contending that his bid for A to E Wards should be considered and that in respect of the bid for F and G Wards where the Petitioner had withdrawn its offer, at the highest, the deposit submitted by the Petitioner could be forfeited in accordance with tender conditions. The Petitioner, however, submitted that the name of the firm should not be deleted from the approved list of suppliers, under the tender conditions. On 9th October 2000, the Petitioner stated in another representation that it was learnt that the Municipal Corporation was proposing to cancel the entire supply as against the Petitioner. The Petitioner submitted that this would only result in the contract being awarded to some other party at a higher

rate.

2. On 4th September 2001 the Municipal Corporation issued a show cause notice to the Petitioner. The notice recited that in response to the tenders that were floated by the Corporation, the Petitioner submitted bids for A to E Wards and, in another group, for F and G Wards including the Asphalt Plant at Worli and Dharavi. The rates quoted by the Petitioner were found to be the lowest for Items 1, 2, 3 and 7 for A to E Wards and Items 4, 5 and 6 for F and G Wards. Hence, the bids submitted by the Petitioner were recommenced by the Tender Committee. The notice recited that an interim work order to supply material upto Rs.20 lakhs was issued to the Petitioner on 19th September 2000. However, prior thereto on 15th September 2000, the Petitioner had declined to supply two items. The Municipal Corporation in its notice stated that under tender condition 5, the deposit of Rs.30,000/- was liable to be forfeited if a tenderer withdrew his offer before the decision of the Standing Committee was known or, in the event of the tender being accepted, the tenderer failed to

execute articles of agreement. The Petitioner was informed that as a result of the withdrawal by the Petitioner, the Corporation has to incur excess expenditure by issuing the work order to the second lowest bidder at a rate higher than that quoted by the Petitioner. The Petitioner was called upon to explain within a period of seven days as to why his deposit of Rs.30,000/- should not forfeited in accordance with the tender conditions and why the name of the Petitioner should not be black listed from the list of registered suppliers of the Municipal Corporation for a period of three years. The Petitioner submitted a reply to the notice on 12th September 2001. By the impugned order dated 9th January 2002, the Director (Engineering Services and Projects) passed an order forfeiting the tender deposit of Rs.30,000/- and black listing the Petitioner for a period of three years from the list of registered suppliers of the Municipal Corporation. The order records that the Petitioner was given a hearing before it was passed.

3. On behalf of the Petitioner, it has been submitted that the offer was withdrawn for two items in F and G Wards on 15th

September 2000 and the Municipal Corporation issued its acceptance subsequently on 19th September 2000. The Standing Committee, it was submitted, was moved for its approval under Section 69(3) sometime in December 2000. Hence, it was submitted that the statement in the order that the Petitioner had withdrawn the offer after accepting the ad-hoc work order of the Corporation was erroneous. Moreover, it was submitted that the finding that the Petitioner had withdrawn its offer "with deliberate intention and ulterior motive"; that this caused a loss of revenue to the Corporation of about Rs.8 lakhs did not form part of the allegations in the show cause notice and no basis was indicated in the impugned order in respect thereof. On the other hand, Counsel appearing on behalf of the Corporation justified the forfeiture with reference to tender condition No.5 and the order of black listing by relying on the undertaking which was furnished by the Petitioner at the time when the tender was submitted expressly recognising that a withdrawal of offer could lead to blacklisting. Counsel submitted that the Petitioner was clearly on notice when the undertaking was submitted that the

offer would have to be kept alive until the decision of the Standing Committee of the Municipal Corporation and that in the event that the offer was withdrawn, the tender deposit would be liable to be forfeited and the name of the Petitioner would be liable to removed from the approved bidders of the Municipal Corporation. These submissions can now be considered.

4. In so far as the question of forfeiture is concerned, condition No.5 of the General Directions to Tenderers stated as follows :

> "The tender deposit will be forfeited if the tenderer withdraws his tender before the decision of the Standing Committee is known or if in the event of its being accepted, he fails to execute the articles of agreement when required or to make a further deposit which together with the sum already deposited will make the total deposit equivalent to five percent of the value of the contract".

The tender condition, therefore, clearly stipulated that the tender deposit was liable to be forfeited if the tender was withdrawn before the decision of the Standing Committee was known or if the tender was accepted, the tenderer failed to execute an agreement.

Therefore, two separate eventualities were contemplated in Condition No.5. The first is where even before the decision of the Standing Committee the tenderer withdraws his offer. The second is a situation where the tenderer fails to execute the articles of agreement upon the acceptance of the tender. In the present case, as the facts would show, tenders were floated in June 2000. On 15th September 2000, the Petitioner withdrew a part of the offer in respect of two items in F and G Wards on the ground that the quarry owner with whom he had contracted had declined to effect supply. Now, obviously the Municipal Corporation would not be concerned with such arrangement as the Petitioner or, for that matter any other bidder made for implementing the supplies which were to be effected to the Municipal Corporation. The tender conditions require a disclosure of the source through which the materials would be supplied. The contract however, was to be between the Corporation and the bidder whose bid was to be accepted. The disclosure of the source of supplies is required to be made in order to enable the Corporation to evaluate the bid and to satisfy itself of the capability of the bidder.

The order of forfeiture cannot be regarded as being contrary to the condition contained in the directions to tenderers which form part of the notice inviting tenders. The exercise of the writ jurisdiction under Article 226 of the Constitution is in these circumstances not warranted in so far as this aspect of the matter is concerned.

5. On the question of blacklisting, it is submitted before the Court for the Petitioner that the show cause notice dated 4th September 2001 adverted to tender Condition No.5 and that apart from a forfeiture of the tender deposit, the tender condition did not make any provision for blacklisting. On the other hand, at the hearing of the Petition Counsel appearing on behalf of the Municipal Corporation has placed on the record the General Directions to Tenderers and the Tender Form. In the Tender Form, each bidder was required to submit an undertaking in the following terms :

> "I/We hereby request you not to enter into a contract with any other person or persons for the supply of the materials for which the present tender is submitted until notice of non-acceptance of this tender has first been communicated to me/us and in consideration of your agreeing to refrain from

> so doing. I/We agree not to withdraw the offer constituted by this notice non-acceptance which date shall be not later than ten days from the date of decision of the Standing Committee or of the Corporation as may be required under Bombay Municipal Corporation Act, not to accept this tender and I/We agree that if contrary to the agreement contained in this clause I/We withdraw the tender before the said date, the amount deposited by me/us as aforesaid shall be liable for forfeiture by the Municipal Corporation of Greater Mumbai and my/our name/names shall be liable to be removed from the list of approved dealers with the corporation. I/We also agree to the forfeiture of the said deposit if in the event of your accepting my/our tender. I/We fail to execute the formal contract or to deposit when called upon to do so, a further sum so as to make the total deposit equivalent to 5 percent, of the contract amount either in cash (not to bear interest) or in public securities as security for the faithful performance of the contract." (emphasis supplied).

By the undertaking the bidder agrees not to withdraw his offer for a stipulated period until the decision of the Standing Committee and a stipulated period thereafter. Each bidder thereupon further undertakes that if the offer is withdrawn, the tender deposit would be liable to be forfeited and the name of the bidder would be liable to be deleted from the list of the approved bidders of the Corporation. Counsel appearing on behalf of the Petitioner submits that the Municipal

Corporation cannot justify its action upon the aforesaid undertaking on the ground that it does not form a part of the notice to show cause dated 4th September 2001. I do not find any merit in the submission for the simple reason that the notice to show cause called upon the Petitioner to explain as to why action be not taken for blacklisting the name of the Petitioner from the list of registered suppliers for a period of there years. If the notice to show cause was bereft of any contractual or other authority such a challenge could well be considered. However, the attention of the Court is drawn to the terms of the undertaking which every bidder is required to submit and of which there is no dispute in the present case. Hence, it would not be permissible to the Petitioner to contend that the show cause notice must fail.

6. The Municipal Corporation invites bids involving large financial implications and involving the interests of the community for whose benefit infrastructural services are provided. Withdrawal of offers by bidders is liable to result in escalating costs and project

delays to the detriment of public interest. The formation of cartels and collusive bidding are unfortunately a matter of reality. The Municipal Corporation, therefore, protects itself and the public interest in demanding such an undertaking. The consideration for the undertaking is the consideration or evaluation which the Corporation bestows upon each bid and the opportunity which is given to every bidder to participate in the process leading up to the award of the contract. Bidders cannot withdraw as they will, oblivious of the concerns of the community whom the Corporation, at least in principle, is expected to protect. In administrative law, once authority to take action exists, the non-disclosure of the source or even the disclosure of a wrong source will not vitiate the action. The contention of a lack of authority must fail.

7. However, in order to obviate any grievance on the part of the Petitioner of unfair treatment on the ground that he has not had an opportunity to deal with the undertaking or to support his defence for a valid reason, it would be just and proper in my view if the matter is remanded back to the Director (Engineering Services and Projects)

to consider the matter after furnishing the Petitioner an opportunity of being heard.

8. In these circumstances, this petition shall stand allowed in part. In order to facilitate a fresh determination by the Director (Engineering Services and Projects), the impugned order dated 9th January 2002 to black list the Petitioner for three years is set aside. The Petitioner will be at liberty on or before 11th April 2005 to submit a further reply to the notice to show cause on the issue of black listing and the invocation of the undertaking. The Director (Engineering Services and Projects) of the Municipal Corporation shall furnish an opportunity of being heard to the Petitioner on or before 30th April 2005 and shall pass a final order no later than 31st May 2005. Since in implementation of the impugned order, a circular dated 9th March 2002 (Exh.J) was issued by the Municipal Corporation, it is needless to add that the circular shall not be implemented until a final decision is arrived at by the Director (Engineering Services and Projects).

9. The petition is disposed of in the aforesaid terms. No costs.

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